THE DICKINSON SCHOOL OF LAW

MEMORANDUM

TO: House Judiciary Committee
FROM: Professor Michael A. Mogill
DATE: November 12, 1996
RE: **Proposed H.B. 2669 and Proposed Amendment**

Thank you for the opportunity to come before you this morning to share my comments concerning the above-referenced legislation. I presently serve as a faculty member of The Dickinson School of Law and have practice experience of nearly twelve years in representing both plaintiffs and defendants in private and public litigation. My initial comments will be directed towards the proposed legislation establishing an independent cause of action based on the outrageous conduct of another resulting in severe emotional distress, with my subsequent comments directed towards the proposed amendment concerning the disposition of the remains of a deceased party to a divorce action.

H.B. 2669

The language of this proposed statute states that one will be liable for damages if his conduct is: 1) extreme and outrageous, 2) either intentional or reckless, and 3) causes severe emotional distress to another. Subparts (a) and (b) are identical in scope and nearly identical in language to that contained in the *Restatement (Second) of Torts* §46. The *Restatement* has been quite influential in the development of tort law, as its purpose is to summarize and

rearticulate general principles of the common law representing a consensus view of the courts. As such, the rules set forth in the *Restatement* are meant to keep pace with common law developments in light of changes in society and public policy. By contrast, subsections (c) and (d) in H.B. 2669 go beyond the explicit language in *Restatement* § 46. Each of these subparts will be discussed, in turn, below.

The law of torts is often viewed as a battleground of social theory. Its primary purpose is the fair adjustment of the conflicting claims of parties concerning civil wrongs, other than the breach of contract, for which damages are provided. Tort law perceives society's interest as trying to fairly and promptly resolve disputes between individuals, as well as articulating rules which achieve desirable social results, both for the present and in the future. In stating these rules, courts and the legislatures identify the interests to be protected by the law. Once interests have been identified, society obligates individuals to comply with the socially desired standard. When individuals violate those obligations, tort law will provide compensation for the harm to that legally recognized interest in order to adjust losses caused by such activity.

The purpose of the law creating a separate cause of action for one's intentional or reckless infliction of severe emotional distress upon another is to protect one's piece of mind as an independently recognized right. While the law was initially slow to recognize this independent interest in freedom from emotional distress standing alone, it has been fully recognized in recent years. This is a result of the increasing recognition placed by society on the individual's interest in privacy and emotional well being, as well as a heightened sensitivity to protect emotional health, not just physical health. In such instances, the

defendant's conduct is viewed as lacking social utility, and it is therefore in society's best interest to nip this undesirable conduct in the bud. Moreover, this claim is viewed as being common sensical in providing for civilized conduct in today's world, so that individuals will meet the community's moral code.

The claim for damages based on the intentional infliction of emotional distress clearly has limitations. Most particularly, liability is only appropriate when the defendant's conduct has been "extreme and outrageous." As comment d to *Restatement* §46 states:

> It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by "malice," or a degree of aggravation which would entitle plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his sentiment against the actor, and lead him to exclaim, "Outrageous!."

Thus, it is usually not one instance of conduct alone but a prolonged course of such conduct which will support this claim. Case law examples including situations where a defendant spread false rumors that the plaintiff's son had hung himself, where the defendant was responsible for bringing a mob to the plaintiff's door at night with continual threats to lynch him unless he left town, where a defendant continued solicitations for illicit intercourse accompanied with indecent pictures and exposure of himself to a married woman, and where defendant rubbish collectors threatened to beat up the plaintiff and put him out of business unless he paid "protection money" to them. Moreover, the "extreme and outrageous

character" of the defendant's conduct can be found by the defendant's abuse of a position relative to the plaintiff which gives the defendant some actual or apparent authority over the plaintiff, or where the defendant has acted knowingly in taking advantage of a person's particular susceptibility to emotional distress. *Restatement* §46, comments e and f.

The law further limits a defendant's liability by protecting one's freedom to express unflattering opinions of another, however wounded the recipient may be by those expressions. Again, comment do to the *Restatement* notes:

> The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. The rough edges of our society are still in need of a good deal of filing down, and in the meantime plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate and unkind. There is no occasion for the law to intervene in every case where someone's feelings are hurt. There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.

Thus, while the law has been moving in the direction of recovery for this action, the limitation that the conduct be extreme and outrageous limits recovery to the most egregious instances of conduct.

A second limitation is that the defendant's actions must be either intentional or reckless. Thus, a claim will not prove effective unless one desires to inflict severe emotional distress upon another or knows that such distress is certain or substantially certain to result, or where one acts recklessly in deliberate disregard of the high probability that severe emotional distress will result from his conduct. *Restatement* § 46, comment i. While such a state of mind, at times, not be easily determined, it may be inferred from one's conduct

itself. Specifically, if the conduct is indeed "outrageous," it is generally thought to have been intended to cause severe emotional distress.

A third restriction is that the defendant's conduct must result in "severe emotional distress." While emotional distress includes such highly unpleasant mental reactions as fright, horror, grief, shame, humiliation, embarrassment, and the like, liability will only be found where such results are "extreme." Again, as noted in *Restatement* § 46, comment j:

> Complete emotional tranquility is seldom attainable in this world, and some degree of transient and trivial emotional distress is a part of the price of living among people. The law intervenes only where the distress inflicted it so severe that no reasonable man could be expected to endure it. The intensity and duration of the distress are factors to be considered in determining its severity.

Moreover, a victim will generally not be able to recover for exaggerated and unreasonable emotional distress, unless the defendant has knowingly acted upon a plaintiff's particular susceptibility to such distress. Therefore, "extreme emotional distress" is measured against how a reasonable person would react to such conduct, thereby further limiting a defendant's potential liability.

A final instance in which recovery is limited under the proposed legislation occurs when the defendant's outrageous conduct is directed at a third person. For instance, a parent may wish to sue a defendant who has intentionally inflicted severe emotional distress upon his child. Section (d)(1) limits this claim to a member of the aggrieved third party's immediate family who was present at the time of the injury to that third party or to non-family members present at the time of the conduct if they, in addition, suffer bodily harm. These limitations can be justified by the practical necessity of drawing the line for potential

liability at a reasonable point. Thus, by limiting recovery to persons present when a defendant's conduct is directed at a third person, the law need not fear that those not present may " act outraged" if they learn of the defendant's act afterwards. Moreover, the plaintiff's presence during the course of this outrageous conduct provides assurance that whatever harm is suffered will likely be "extreme emotional distress." Thus, on the one hand, the proposed legislation recognizes that the defendant is highly culpable to those present when the defendant directs activity at a third person which is deemed "outrageous," while, on the other hand, limiting one's potential liability to that select group of individuals.

Subpart (c) of the proposed legislation limits the impact of *Kazatsky v. King David Memorial Park, Inc.*, 527 A.2d 988 (Pa. 1987), in which the Pennsylvania Supreme Court held that it was "unwise and unnecessary to permit recovery... based on the defendant's 'outrageousness' without expert medical confirmation that the plaintiff actually suffered the claimed distress." *Kazatsky*, at 995. Subpart (c) eliminates the requirement of expert medical confirmation and is thereby consistent with *Restatement* § 46, which does not obligate the plaintiff to produce such evidence. The lack of any so-called, "expert medical evidence" may not be detrimental, because juries know emotional distress exists from their own experiences of how disagreeable emotions can result from one's conduct. In essence, the existence of severe emotional distress will be judged from the nature of the outrageous conduct, as determined by the jury. Medical testimony, in general, only becomes necessary when such testimony is so distinctly related to some science, skill or occupation beyond the knowledge or experience of average lay people; in the instance of severe emotional trauma, such results are within the realm of the common understanding which jurors bring with them

to the courtroom. Moreover, nothing within *Restatement* § 46 prohibits the plaintiff from introducing medical evidence supporting his claim, nor prohibits the defendant from introducing medical evidence to undercut the plaintiff's claim, thereby leaving it up to the parties to determine the evidence that best supports their contentions.

Finally, subpart (d) prohibits two defenses. Specifically, this subpart prohibits a defendant from responding to a claim by stating that he is only insisting upon his legal rights permissibly, or that his conduct was in self-defense based upon "extreme provocation." In essence, the prohibition of these defenses serves to limit privileges which the defendant would otherwise be able to assert. As such, these limitations are directly contrary to comment g of *Restatement* § 46, which allows a defendant to avoid liability for the intentional infliction of emotional distress where the defendant has either insisted upon his legal rights permissibly or acted in such a manner in self-defense against another's conduct. For example, under *Restatement* § 46, a landlord may call on a tenant whose rent is not paid and threaten to evict her, full knowing that the tenant and her children are destitute and ill. While the conduct might be characterized as "heartless," the landlord has only availed himself of his legal remedies and therefore has exercised his legal privilege so s not to be responsible for any emotional distress suffered by the tenant. The proposed subpart (d) would eliminate this privilege.

The Pennsylvania Supreme Court has not yet formally recognized the claim for intentional infliction of emotional distress. While it has "acknowledged" that *Restatement* § 46 exists, it decided in *Kazatsky* that "because the evidence educed in this matter does not establish a right of recovery under the terms of the provision as set froth in the *Restatement*,

we again leave to another day the question of the viability of § 46 in this Commonwealth." *Kazatsky*, at 989. As a result, Pennsylvania remains an anomaly, given that the vast majority of states have adopted §46 in its entirety. In addition, the *Kazatsky* decision, while admittedly from the Commonwealth's highest court, is in sharp contrast to the plethora of both federal and lower Pennsylvania appellate court decisions which have adopted and applied § 46 as a potentially valid cause of action. Thus, one recent lower appellate court decision noted that the "status of this cause of action is unclear in Pennsylvania as some appellate courts have adopted *Restatement* § 46, but our Supreme Court has not." *Fewell v. Besner*, 664 A.2d 577, 581 (Pa. Super. 1995). Moreover, the Pennsylvania courts are replete with "confusion and conflict of law" in determining whether to adopt § 46 of the *Restatement*. *Johnson v. Caparelli*, 625 A.2d 668, 671 (Pa. Super. 1993). For example, in a recent decision, the Superior Court held that § 46 of the *Restatement* created a valid claim for an 18 year-old plaintiff who, in her first job, was the victim of numerous incidents of sexual harassment, intimidation, physical abuse, and retaliatory termination from her job, leading to severe emotional distress, with her allegations having been supported by two fellow employees. The court went on to state that § 46 did not require the introduction of any expert medical testimony to sustain her allegations. *Hackney v. Woodring*, 622 A.2d 286, 290 (Pa. Super. 1993). However, the Pennsylvania Supreme Court, in a *per curiam* order, summarily reversed this decision, merely cited to the *Kazatsky* case. *Hackney*, 652 A.2d at 292 (Pa. 1994). Therefore, it is unclear whether the decision was reversed because the Supreme Court determined that the lower appellate court improperly adopted § 46 or

improperly upheld a claim without expert medical testimony. Thus, the pending legislation will provide clarity and understanding to this area.

It is understandable that there are concerns regarding this proposed legislation. Among these are that the passage of this legislation will open up the "floodgates" of litigation, that courts should not take up valuable time in dealing with such matters, that false claims may be filed, that the standard of "extreme and outrageous" is too vague to govern one's conduct, that this claim impinges upon freedom of speech, and that it will be difficult to measure damages. However, as noted earlier, the purpose of tort law is to provide for the fair adjustment of the conflicting claims of parties, with public policy necessarily supplying limitations to acceptable human behavior. Nor is it not surprising to hear a concern regarding possible "floodgates" of potential cases, as this is typically raised concerning new causes of action. This notion, as well as the fear regarding possible false claims, can be controlled via the discovery process, cross-examination, impeachment of witnesses, proper jury instructions regarding the credibility of witnesses and weight of evidence, various sanctions for perjury, and the overall careful scrutiny of the evidence supporting the claim, with the use of common sense distinguishing serious and valid claims from trifling non-claims. Moreover, it remains within the court's power to determine which cases are appropriate for the jury, with the court deciding whether sufficient evidence has been introduced to allow the jury to determine that an individual's conduct has been "extreme and outrageous." *Restatement* § 46, comment h. Furthermore, the existence of a multitude of claims only shows society's pressing need for legal redress of these particular grievances. In addition, courts have been able to determine damages concerning claims which affect various

other intangible interests including loss of consortium, pain and suffering, loss of enjoyment of life, and the negligent infliction of emotional distress, with jury instructions helping to provide guidance. Finally, the standard that the conduct be "extreme and outrageous" clearly limits the application of this new cause of action, thereby allowing the judicial system to handle wrongdoing that other claims would not satisfy as well as recognizing the importance of one's mental health.

Of course, concerns may still exist regarding the judiciary's interpretation of this new cause of action, should it be formally adopted. Clearly, firmer boundaries for this claim will have to await judicial construction via individual decisions. However, it is instructive to note that Pennsylvania cases finding the plaintiff entitled to recovery under the standard articulated in *Restatement* § 46 have been quite rare. Examples of cases providing recovery are *Banyas v. Lower Bucks Hospital*, 437 A.2d 1236 (Pa. Super. 1981) (facts showed that physicians deliberately falsified cause of death in decedent's death certificate to attribute that death to the plaintiff, in an attempt to cover up the physicians' own negligence) and *Chuy v. Philadelphia Eagles' Football Club*, 595 F.2d 1265 (3d Cir. 1979) (team doctor falsely told plaintiff football player that he had a fatal disease with full knowledge that the player did not have that disease). In contrast, a significantly higher number of cases have determined that the adoption of this cause of action would still not allow the plaintiff to recover. Examples include *Fewell v. Besner*, 664 A.2d 577 (Pa. Super. 1995) (no claim established by defendant doctor's disclosure of confidential information from his patient that she intentionally harmed her child); *Snyder v. Specialty Glass Products, Inc.*, 658 A.2d 366 (Pa. Super. 1995) (no claim established when supervisor screamed at plaintiff employee and subsequently

reprimanded him and demoted him to entry level position when plaintiff was late for work because he had administered emergency medical treatment to an accident victim); *Parano v. O'Connor*, 641 A.2d 607 (Pa. Super. 1994) (no claim where defendant allegedly defamed plaintiff hospital administrator's conduct in news article by stating that plaintiff was less than helpful, uncooperative and adversarial); and *Britt v. Chestnut Hill College*, 632 A.2d 557 (Pa. Super. 1993) (no claim established against teacher and college for having "sabotaged" plaintiff's reputation and academic career by providing low grades in retaliation for plaintiff's class comments and by revoking certain pre-approved class credits so plaintiff did not graduate on time). These are indicative of the many cases which have denied the plaintiff's claim for intentional infliction of emotional distress.

A clear gap exists in Pennsylvania tort law. By failing to directly address the question of whether *Restatement* § 46 is the law of Pennsylvania, the state Supreme Court has implicitly appeared to defer to the legislature. Indeed, the legislature may be better able to investigate and study issues of tort liability, free of the constraints faced by litigants in a specific judicial proceeding and away from the judicial spotlight. Moreover, the legislature is better able to address this issue in a non-piecemeal manner resulting in a consistent, comprehensive statute addressed at protecting all recognized interests, rather than being limited by the narrow facts presented in a particular case.

It is therefore my opinion that the Commonwealth would be best served through the adoption of proposed H.B. 2669, subparts (a), (b), and (c); however, subpart (d) clearly goes beyond the tenor of *Restatement* § 46 and is not recommended for adoption. The adoption of the proposed bill will clearly put Pennsylvania in the "mainstream" of tort law in this area.

In essence, the adoption of the bill recognizes that a "perfect formula" is not attainable in an imperfect world; if we rely on achieving perfection at some point in time, we will do an injustice in the interim. Admittedly, the law exists to separate valid from invalid claims. However, there is no mistaking that "clear" answers of black and white quickly fade into gray. Therefore, the courts are positioned and trusted to determine the full reach of legislation, being obliged to follow statutory mandates and to answer unanswered questions in interpreting the law. This flexible approach will allow the Pennsylvania courts to add to that body of case law which has already addressed *Restatement* § 46 and applied it in a clearly cautious manner.

Comments on Proposed Amendment

This proposed amendment allows certain persons related by blood to be allowed to proceed in court to determine the disposition of the body of their deceased relative should that relative become deceased prior to the entry of an order for divorce. The gist of this proposed legislation appears to have its origins in the *Restatement (Second) of Torts* § 868, which states that:

> One who intentionally, recklessly or negligently removes, withholds, mutilates or operates upon the body of a dead person or *prevents its proper interment* or cremation is subject to liability to a member of the family of the deceased who is entitled to the disposition of the body. (emphasis added)

This section of the *Restatement* is seen as a special case vindicating the mental health of the family members of the decedent. *Restatement* § 868, comment a.

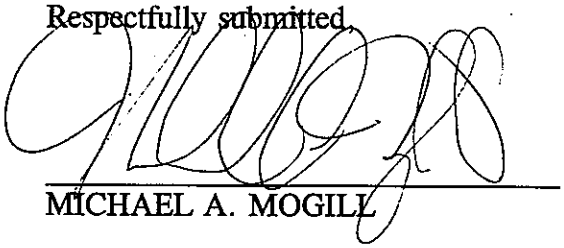
However, the proposed amendment is different from the *Restatement* in at least two respects. In most states, the right of the disposition of a decedent's body remains in the surviving spouse. *Restatement* § 868, comment b. The proposed amendment specifically limits the right to question the disposition and interment of the body of the decedent to those in kinship or blood relationship; by implication, this would not include the decedent's spouse. Moreover, the proposed statute does not subject a defendant to "liability," as does *Restatement* § 868, but instead merely states that "a single action relating to the disposition and interment of the body of the deceased party" may be brought by the decedent's bloodline.

Three concerns exist regarding the proposed legislation. The first is that there is not enough guidance given to determine how to dispose or inter the body, nor does the proposal explicitly state that one not blood-related is excluded from pursuing this claim. Second, the proposed legislation fails to distinguish between "lineal" consanguinity (those in a direct ascending or descending line from the decedent, such as a son, father, grandfather, etc.,) and "collateral" consanguinity (those persons who have the same ancestors, but who do not descend or ascend one from the other, such as aunts and nephews). The Committee may want to consider addressing these areas in order to provide more guidance in the legislation. Finally, if the legislation intends that there be no monetary relief provided in such disputes, the committee may wish to make clear that the proposed legislation does not provide for any "liability," meaning that relief is limited to the disposition of the decedent's body, rather than to any type of financial compensation.

Conclusion

Once again, I appreciate the invitation to be before you today in order to offer the above comments. I hope that you will not hesitate to contact me if I can be of further assistance to you concerning this legislation or other future matters.

Respectfully submitted,



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